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No. 06-949

FILED
FEB 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DANIEL KELLY
REINHART BOERNER VAN DEUREN S.C.
(Counsel of Record)
1000 North Water Street, Suite 2100
Milwaukee, Wisconsin 53202
(414) 298-1000 Fax: (414) 298-8097

Attorney for Petitioner Peter F. Cloeren

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. Introduction

Mr. Cloeren submits this reply brief because Mr. Druschel mischaracterized (1) the contacts upon which Wisconsin's courts relied in finding specific personal jurisdiction, (2) the significance and application of this Court's decision in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), and (3) the effect on this case of the varying jurisdictional standards currently being used by the various United States Circuit Courts of Appeals. In doing so, Mr. Druschel's arguments concentrated more on the merits of the case than on whether Mr. Cloeren's Petition presents a question this Court should answer. That focus, however, actually confirms the importance of granting this Petition to review and reverse the Wisconsin courts' unconstitutional jurisdictional test.

II. Wisconsin's Courts Did Not Refer To, Or Rely On, Any Contacts Related To The Cause Of Action.

Mr. Druschel invites the Court to ignore Wisconsin's jurisdictional analysis by suggesting the Wisconsin courts identified and relied upon the proper types of contacts in asserting personal jurisdiction over Mr. Cloeren. To this end, he searched the record for bits and pieces of information that might create the impression that the courts considered contacts that were in some way related to the cause of action he asserted against Mr. Cloeren. But for all his effort, he found nothing to support his thesis.

In finding specific personal jurisdiction over Mr. Cloeren, both the Chippewa County Circuit Court and the Wisconsin Court of Appeals relied exclusively on contacts occurring after Cloeren, Inc. (the "Corporation") acquired Production Components. That is to say, the contacts underpinning the courts' analyses did not occur until *after* the transaction took place upon which Mr. Druschel bases his cause of action.

In this case, contacts subsequent to the Corporation's acquisition of Production Components can have no relationship whatsoever to the claimed cause of action. Mr. Druschel brought his complaint because he believes Mr. Cloeren breached his obligation to make a required payment under a promissory note (which supplied partial consideration for the Corporation's purchase of Production Components) (the "Note"). Relevant contacts would be those bearing some relationship to the formation or performance of the Note. But no one – not Mr. Druschel, not the Circuit Court, and not the Court of Appeals – explained how any of Mr. Cloeren's contacts with the State of Wisconsin bear the slightest relationship to the Note. The courts did not even rely on execution of the Note as a jurisdiction-conferring contact (and for good reason – it was executed in Texas (App. 61-68, 108)).

Post-transaction events cannot travel back in time to establish the requisite relationship with the State of Wisconsin. That temporal transposition is impossible unless the court adopts a jurisdictional analysis that conflates the concepts of specific and general personal jurisdiction. In the Wisconsin courts' hands, the "relatedness" requirement expanded so broadly that any contact with the forum state, irrespective of its connection to the cause of action, counted in the minimum contacts equation. The Wisconsin courts adopted a jurisdictional standard that entirely ignores the "relatedness" aspect of specific personal jurisdiction. Removing that key component collapses specific jurisdiction into general jurisdiction. *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996) ("[R]elatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases[, and it] . . . ensures that the element of causation remains in the forefront of the due process investigation.").

Perhaps belatedly recognizing the Wisconsin courts' fundamental error in their jurisdictional analyses, Mr. Druschel now attempts to remedy this defect by asserting that the courts relied on pre-acquisition contacts (hoping

thereby to establish at least the possibility that the contacts were related to the Note).[1] However, his one citation to Mr. Cloeren's appendix (App. 5) fails to verify his assertion. None of the contacts listed there refer to any contact between Mr. Cloeren and Wisconsin prior to the Corporation's acquisition of Production Components. Nor do they describe any contact even remotely related to the formation or performance of the Note upon which Mr. Druschel bases his claim.[2]

Giving Mr. Druschel's assertion the broadest possible latitude, it is possible he means to refer to the telephone conversations with Douglas Darrow and Leigh Darrow when he speaks of pre-acquisition contacts. However, nothing in the record supports that reading; indeed, the record contradicts it. The transcript of the hearing in which the circuit court denied the motion to dismiss for

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[1] Brief in Opposition to Petition For Writ of Certiorari at 7 ("Druschel Brief.")

[2] Further acknowledging the defect in the Wisconsin courts' analyses, Mr. Druschel now advances facts upon which he believes the courts could have relied, but did not, in reaching their jurisdictional decisions. For example, Mr. Druschel claims that Mr. Cloeren personally attended the closing of the business purchase in Wisconsin. (Druschel Brief 14.) But the very transcript page to which Mr. Druschel cites for support contradicts his assertion. Mr. Cloeren testified that: "I don't know when they signed their half of the papers. We went up there to collect the stock certificates and tell the employees that the company had been purchased." (App. 108.) That would be a *post*-acquisition visit. Mr. Druschel also refers to the fact that Mr. Cloeren individually obligated himself to payments in excess of $2 million to Druschel. (Druschel Brief 14.) While this is true, it does not constitute a contact with the State of Wisconsin. The Note was executed in Texas, its situs is Orange, Texas, and it provides that it shall be construed and governed under the laws of Texas. (App. 61-68, 108.) Finally, Mr. Druschel turns to the fact that Mr. Cloeren personally pledged the stock he owned in Cloeren, Inc. as collateral. However, Cloeren, Inc. is a Texas corporation, Mr. Cloeren is a Texas resident, and the shares are held by a Texas bank. (App. 48-50, 57-58.) Mr. Druschel does nothing to explain how this counts as a Wisconsin contact.

lack of personal jurisdiction confirms that even these telephone calls were related to the management of Production Components: "The contacts [post acquisition personal visits to Wisconsin] are for management of a business which the corporation he owns bought.... They are substantial contacts to oversee Production Components-Cloeren, Inc. *The phone calls are frequent and for the same purpose.*" (App. 33.) (emphasis supplied). Neither of the Wisconsin courts, however, explained how post-acquisition telephone calls for the purpose of managing Production Components bear any relationship whatsoever to the Note. Nor does Mr. Druschel.

III. The Respondent Misapplies *Burger King v. Rudzewicz.*

The Court likely has little need for us to point out Mr. Druschel's misapprehension of the significance and application of the *Burger King* opinion. *Burger King* did not answer the questions presented by this Petition. But this is not just our opinion – the continuing split amongst the United States Courts of Appeals, bemoaned as recently as 2004, demonstrates that the question still begs an answer. *See, e.g., Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 100 (3rd Cir. 2004) (The "relatedness" question "has plagued federal Courts of Appeals and has resulted in divergent rules."). We will confine ourselves to simply highlighting a few of the errors into which Mr. Druschel fell.

A. *Burger King* Did Not Dispense With The "Relatedness" Inquiry.

Mr. Druschel suggests *Burger King* authorizes courts to consider forum contacts that occur after formation of the contract without regard to whether those contacts relate to the cause of action. From that mistaken assumption, Mr. Druschel argues that this Court need not consider this Petition because *Burger King* essentially eliminated any "relatedness" inquiry. But that is not at all what this Court

said, and nearly every passage quoted by Mr. Druschel refutes his assertion.

For instance, in discussing the "fair warning" the Due Process Clause is supposed to give the average American, he notes that *Burger King* says that obligation "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *and* the litigation results from alleged injuries that 'arise out of or relate to' those activities." 471 U.S. at 472-73 (emphasis supplied). (Druschel Brief at 9-10.) Mr. Druschel discusses the "purposefully directed" component of this test, but only as a means of avoiding the "arise out of or relate to" part of the test.

He does this not once, but twice. He again cites *Burger King* for the proposition that "where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that *arise proximately from such activities*;. . . . " 471 U.S. at 473 (citations omitted, emphasis supplied). (Druschel Brief at 10.) Mr. Druschel never acknowledges that this passage requires a "proximate" relationship between the litigation and the activities.

Finally, nothing about the resolution of the *Burger King* case supports Mr. Druschel's argument that this Court has answered the "relatedness" question presented in this Petition. This Court found specific personal jurisdiction in *Burger King* not simply because of the contract between the parties, but because the dispute between them arose out of the on-going operation of Mr. Rudzewicz's Burger King franchise. In fact, the Court exhaustively detailed the inseparable relationship between the litigation and Mr. Rudzewicz's post-acquisition contacts with Burger King in Florida, all as they related to the operation and failure of the franchise.[3] Because the dispute was

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[3] This Court extensively described those contacts:

> The Court of Appeals concluded, however, that in light of the supervision emanating from Burger King's district office

(Continued on following page)

indisputably and inextricably tied up in the interaction between Mr. Rudzewicz and a Florida corporation *after the purchase of the franchise*, it was appropriate to base jurisdiction on those post-acquisition contacts. Here, however, the Wisconsin courts (and Mr. Druschel) reject the need to demonstrate how post-acquisition contacts relate in any way to the asserted cause of action.

Burger King did not dispense with the "relatedness" inquiry. Mr. Druschel simply glossed over the portions of the opinion that explicitly call for its application.

> in Birmingham, Rudzewicz reasonably believed that "the Michigan office was for all intents and purposes the embodiment of Burger King" and that he therefore had no "reason to anticipate a Burger King suit outside of Michigan." This reasoning overlooks substantial record evidence indicating that Rudzewicz most certainly knew that he was affiliating himself with an enterprise based primarily in Florida. The contract documents themselves emphasize that Burger King's operations are conducted and supervised from the Miami headquarters, that all relevant notices and payments must be sent there, and that the agreements were made in and enforced from Miami. Moreover, the parties' actual course of dealing repeatedly confirmed that decision-making authority was vested in the Miami headquarters and that the district office served largely as an intermediate link between the headquarters and the franchisees. When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and could only channel their communications to Miami. Throughout these disputes, the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communications by mail and by telephone, and it was the Miami headquarters that made the key negotiating decisions out of which the instant litigation arose.

Burger King, 471 U.S. at 480-81 (citations omitted).

B. *Burger King* Held That A Single Contract Is Insufficient To Confer Jurisdiction On A Nonresident Defendant.

Mr. Druschel makes much of the fact that a promissory note between a Texas resident and a Wisconsin resident is at the "heart of this litigation." (Druschel Brief 12.) It appears Mr. Druschel means to argue that a contract alone, in and of itself, is sufficient to confer personal jurisdiction over a non-resident. However, the *Burger King* case rejected the theory that an "individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum." *Burger King*, 471 U.S. at 478 (emphasis in original). Thus, to hale a nonresident defendant into another jurisdiction, there must be contacts with the forum in addition to the contract itself.

Burger King actually weakens Mr. Druschel's claim that this Court has provided adequate direction to the average American on where he or she may be subject to suit. This Court recognizes that a contract provision identifying which State's law shall be applied in the event of a conflict contributes to the reasonable expectation of where one may be subject to jurisdiction. *Burger King*, 471 U.S. at 482. The Note, and the promissory note it replaced, both state that they "shall be construed under and governed by the laws of the State of Texas." (App. 64, 70-71.) Thus, the *Burger King* case reinforces Mr. Cloeren's reasonable belief that if he were to be sued, it would have been in Texas, not Wisconsin. *Burger King* simply does not support Mr. Druschel's argument that this Court need not take up this Petition.

* * * *

Burger King did not answer the question this Court posed in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). But this Petition now presents the opportunity to do so. Twenty years after recognizing the question we ask the Court to resolve, the Courts of

Appeals have remained unable to harmonize their outcome-determinative jurisdictional tests. It is time for this Court to bring uniformity to this aspect of the Due Process Clause and answer the question that has been "plaguing" the United States Courts of Appeals.

IV. The Tests Applied By The Circuit Courts Of Appeals Are Outcome Determinative.

Finally, Mr. Druschel argues that granting this Petition is not necessary because under any of the "relatedness" tests, Mr. Cloeren would be subject to personal jurisdiction in Wisconsin. (Druschel Brief 14.) But that is certainly not true. Below we foreshadow the arguments we will direct to the merits of this case (should the Court grant the Petition) for the purpose of demonstrating that answering the question we present can change the outcome of this case.

The conflated jurisdictional test employed by the Wisconsin courts (in which all forum contacts get lumped together, regardless of their relationship to the cause of action) obviously resulted in an affirmative jurisdictional finding. On the other hand, application of the variety of "relatedness" tests used by the United States Courts of Appeals would yield results ranging from "definitely no jurisdiction" all the way to "plausible jurisdiction."

For example, had the Wisconsin courts adopted the "proximate cause" test, they would not have exercised jurisdiction. This test asks whether the forum contacts would be relevant to proving the cause of action. Here, they are not. Mr. Cloeren's post-acquisition management of Production Components makes no fact related to the formation or performance of the Note more or less likely to be true. Because the Wisconsin courts considered only post-acquisition contacts, the case flunks the First Circuit's "proximate cause" test. *See Nowak*, 94 F.3d 708.

On the other hand, had the Wisconsin courts employed the Ninth Circuit's "but-for" test extraordinarily loosely, it is possible (barely) they could find jurisdiction. *See, e.g., Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). In a Rube Goldberg sense, Mr. Cloeren's post-acquisition management of Production Components could relate to the Note. It is true that there would have been no management activity had the Corporation not purchased Production Components, and without that purchase, Mr. Cloeren would not have signed the Note.

Even so, however, the causation arrows between (a) management of Production Components, and (b) the Note, run the wrong direction. That is to say, if the parties had a dispute over Mr. Cloeren's management of Production Components, the Corporation's purchase of the company would be a causative factor in the dispute (i.e., no management activity but for the prior purchase), and therefore Mr. Cloeren's execution of the Note (had it been a Wisconsin contact) would have been a valid contact under this test. But the opposite is not true.

It cannot be said that there would be no Note but for Mr. Cloeren's post-acquisition management activities. Simply stating the proposition this straightforwardly demonstrates its fallacy. In traditional physics, causes precede effects. The same is true in a "but-for" test. It is not possible for events occurring after execution of the Note to have played a part in causing its execution. And neither Mr. Druschel nor the Wisconsin courts have asserted that Mr. Cloeren's post-acquisition contacts caused (even in an attenuated manner) the problem with performance of the Note. Thus, a proper "but-for" analysis would not consider the contacts upon which the Wisconsin courts relied.

The Court's resolution of the question we present in the Petition can, and should, change the outcome of this case. In the larger context, the Court needs to answer the

question it recognized in *Helicopteros* because, depending upon the Circuit in which a defendant finds himself, he will receive more or less Due Process protection. The Court should grant this Petition and return foreseeability and uniformity to the operation of the Due Process Clause.

V. Conclusion.

For all the reasons stated above, Mr. Cloeren respectfully asks this Court to grant his Petition.

Respectfully submitted,

DANIEL KELLY
REINHART BOERNER VAN DEUREN S.C.
(*Counsel of Record*)
1000 North Water Street, Suite 2100
Milwaukee, Wisconsin 53202
(414) 298-1000 Fax: (414) 298-8097

Attorney for Petitioner Peter F. Cloeren